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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION TO
EXCLUDE AUDIO RECORDINGS OF
2009 SPIRITUAL WARRIOR SEMINAR
EVENTS**

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 In an effort to find any relevance in the four days of recorded conversations and
3 workshops prior to the pre-sweat lodge orientation, the State has now re-characterized Mr. Ray's
4 supposed crime in a manner that cannot, as a matter of law, support criminal liability. Because
5 this new theory of the case is not legally viable, and because the recordings have no other
6 relevance, the four days of audio tape preceding the pre-sweat lodge orientation must be
7 excluded.

8 Notwithstanding that the deaths at issue occurred on the afternoon of October 8, 2009, the
9 State now appears to argue that the entire five-day audio recording is relevant because Mr. Ray's
10 criminal conduct is not confined to the afternoon of October 8. See Response at 10. ("Defendant
11 wants the jury to believe his conduct begins - and ends - within a three-hour period. It does
12 not."). Instead, according to the State, Mr. Ray "deployed" "techniques . . . all week in order to
13 persuade the victims and participants to follow his lead and his words." *Id.* Ultimately,
14 according to the State, the decedents died because they were "fully conditioned" to follow Mr.
15 Ray's encouragement and because "they wanted and desired to live up to Defendant's
16 expectations to stay inside the sweat lodge like a 'warrior' in order to 'live impeccably' and 'with
17 honor.'" *Id.* at 7.

18 This outlandish theory of criminal liability has absolutely no support in any body of law.
19 The State's newly identified *actus reus* thus fails for two reasons. First, it would require this
20 Court to create new criminal law in violation of the Due Process Clause. See *State v. Angelo*, 166
21 Ariz. 24, 28 (App. 1990) (Due Process requires that individuals have "fair notice that engaging in
22 the proscribed conduct risks criminal penalties"). Second, criminalizing the conduct the State
23 now identifies—words of encouragement—would not only run counter to bedrock notions of
24 causation and human agency, but would violate the Due Process and First Amendment
25 prohibitions against vagueness in the criminal law and punishing protected expression. Because
26 the State's only argument for the recordings' relevance is not a legitimate legal position, this
27 Court should exclude the audio recordings of the four days prior to the afternoon pre-sweat lodge
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1 orientation on October 8 on the ground that they are irrelevant to the crimes of reckless
2 manslaughter and unfairly prejudicial under Rule 403. See Motion at 1.

3 **I. ARGUMENT**

4 **A. To Assert Any Relevance in the Recorded Seminars, the State Has Alleged A**
5 **Novel and Unworkable Criminal Act.**

6 As explained in the Defense's opening Motion, the four days of recorded workshops and
7 seminars prior to the pre-sweat lodge orientation are not relevant to the charged crimes of reckless
8 manslaughter. The recordings begin on Sunday, October 4, and include literally *days* of
9 dialogues between Mr. Ray and the seminar participants. The conversations span a wide range of
10 topics, from team-building exercises to discussions of participants' very personal and private
11 issues. There is simply nothing in these extended discussions that could have any bearing on
12 whether Mr. Ray committed the charged crimes of reckless manslaughter on the afternoon of
13 October 8. The State's new argument to the contrary requires it to allege a novel and unworkable
14 criminal act.

15 Arizona Revised Statutes section 13-201 provides that "[t]he minimum requirement for
16 criminal liability is the performance by a person of conduct which includes a voluntary act or the
17 omission to perform a duty imposed by law which the person is physically capable of
18 performing."¹ This provision codifies the very most basic rule of criminal law: that there is no
19 crime without an *actus reus*. See *State v. Lara*, 183 Ariz. 233, 234 (1995).

20 But what is the act the State now alleges? The indictment in this case states that Mr. Ray
21 recklessly caused the deaths of three individuals "on or about October 8, 2009." The State now
22 appears to suggest that the direct cause of the deaths that afternoon was volitional conduct by
23 individuals who wanted to "live up to Defendant's expectations," but that Mr. Ray committed a
24 crime by encouraging participants to "live impeccably" in the days before through a series of
25 workshops and discussions modeled after corporate training seminars See Response at 7. If this
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27 ¹ Conduct is defined as "an act or omission and its accompanying culpable mental state" A.R.S. §13-
28 105(6). An "act" is defined as "a bodily movement" *Id.* §13-105(2), and a "voluntary act" is a bodily
movement performed consciously and as a result of effort and determination, *id.* 13-105(41).

1 truly is the State's theory, it raises issues far graver than the admissibility of the audio recordings.
2 As explained below, orally encouraging participants to be their best is not a crime.

3 **B. The Theory of the Case to Which the State Asserts Recordings Are Relevant**
4 **Would Require This Court to Create New Criminal Law and Violate the**
5 **Constitution.**

6 The State has identified no case, ever, in any jurisdiction, that hinges criminal liability on
7 mere words of encouragement for a person to be or do their best. The Defense submits that there
8 has never been such a case. Nor would any reasonable person be on notice that encouraging a
9 competent adult to do his or her best is a criminal act. The State's new theory would thus require
10 this Court to create new criminal law in the midst of a prosecution, in violation of the Due
11 Process requirement that individuals have "fair notice that engaging in the proscribed conduct
12 risks criminal penalties." *State v. Angelo*, 166 Ariz. at 28 (citing *Papachristou v. City of*
13 *Jacksonville*, 405 U.S. 156 (1972)). Nothing in Arizona's criminal statutes or decisional law
14 would give any reasonable person notice that encouraging competent adults to do their best could
15 be a crime.

16 Furthermore, the novel theory the State now advances in its effort to make the audio
17 recordings relevant would be at loggerheads with Constitutional principles. The void-for-
18 vagueness doctrine under the Due Process Clause "requires that a penal statute define the criminal
19 offense with sufficient definiteness that ordinary people can understand what conduct is
20 prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."
21 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). And, subject to narrow exceptions, the First
22 Amendment bars the State from criminalizing expression. *See, e.g., R.A.V. v. City of St. Paul*,
23 505 U.S. 377 (1992) (striking down city's regulation of "hate speech"). Moreover, when a State's
24 criminal law "is capable of reaching expression sheltered by the First Amendment, the [void-for-
25 vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v.*
26 *Goguen*, 415 U.S. 566, 573 (1974). The State's new theory would violate all of these bedrock
27 constitutional principles. Without any precision, definition, or notice, the supposed new crime
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1 would punish the expressive act of encouraging others to do good and live well. It would chill the
2 speech of teachers, coaches, and instructors throughout the State.

3 The Court need not take on these weighty constitutional issues at this moment. The
4 reality is that the four days of audio tape that precede the pre-sweat lodge orientation have no
5 relevance whatsoever to the charged crimes of reckless manslaughter on the afternoon of October
6 8, 2009. Only by grossly distorting the nature of the charged crime, and relying on conduct that is
7 not and cannot be criminal, has the State identified any potential relevance in these tapes. The
8 proper course is for this Court to exclude the audio recordings.

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13 DATED: February 28th, 2011

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18 By: 

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20 Copy of the foregoing delivered this 28th day
21 of February, 2011, to:

22 Sheila Polk
23 Yavapai County Attorney
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25 by 